Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	
	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	

REPLY COMMENTS OF ACS OF ANCHORAGE, INC., ACS OF ALASKA, INC., AND ACS OF FAIRBANKS, INC.

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ACS of Anchorage, Inc. ("ACS-AN"), ACS of Alaska, Inc. ("ACS-AK") and ACS of Fairbanks, Inc. ("ACS-F") (together with ACS-AN and ACS-AK, "ACS"), through counsel, hereby submit their Reply Comments in the above-captioned proceeding.

I. BACKGROUND AND SUMMARY

In its initial Comments, ACS summarized the determination by the Supreme Court and DC Circuit that the Communications Act of 1934, as amended (the "Act") places the burden of proof on the competitive local exchange carrier ("CLEC") seeking access to unbundled network elements ("UNEs") to demonstrate that it would be "impaired" without such access. For this reason, it is inconsistent with the Act to put the onus on the incumbent local exchange carriers ("ILECs") to prove non-impairment in a given market. Thus, ACS urged that the Commission not mandate unbundling unless the CLEC seeking access to the UNE can demonstrate that lack of access would "impair" that CLEC's ability to compete in a market. Under this analysis, entrenched CLECs with substantial market share and facilities would likely be treated differently compared to new-entrant CLECs. ACS respectfully submits that placing the burden of proof on the party seeking to demonstrate impairment is *not* a "shift" in the burden of proof under the Act, but rather the only lawful way to implement the Act pursuant to substantial court precedent.

ACS-AN is joined by ACS-AK and ACS-F in these Reply Comments to respond to the comments submitted to this Commission by General Communication, Inc. ("GCI"). GCI's comments do not present the Commission with an accurate summary of the Regulatory Commission of Alaska ("RCA") UNE proceeding, as GCI claims, and ignores the substantial evidence of non-impairment that ACS provided to the RCA. In its Comments, ACS summarized the evidence it presented to the RCA regarding the Anchorage local exchange market, and attached copies of the comments and reply comments submitted jointly to the RCA by ACS-AN, ACS-AK and ACS-F. The evidence in the RCA proceeding demonstrates non-impairment as to GCI with regard to each of the Anchorage, Fairbanks and Juneau markets.

GCI, however, claims that it requires UNE-Platform ("UNE-P") in Anchorage because it currently cannot reach nine percent of Anchorage loops using its own switching. Even assuming there is a small percentage of customers that GCI cannot yet reach, however, such evidence does not indicate "impairment" in a market under the Act. Under GCI's logic, it could win 90 percent market share in Anchorage, but still be "impaired" in Anchorage if it was unable to reach certain customers using ACS's loops and GCI's own switches. Requiring UNE-P access as to those few customers that GCI claims it cannot reach would not serve the goals of the Act. GCI has failed to demonstrate why it cannot serve those customers using its own cable plant. Ordering UNE-P access for an indefinite period for those few customers that GCI cannot reach via UNE loops would serve only to remove GCI's incentive to further build out its telecommunications facilities or expedite its ongoing transition to cable telephony. ACS also demonstrates herein that GCI has not met its burden to demonstrate impairment without access to dedicated transport or enterprise or mass-market loops.

GCI's request for an impairment finding in the Fairbanks and Juneau markets is premature. GCI has entered into interconnection agreements with ACS of Fairbanks, Inc. and ACS of Alaska, Inc. that make UNE-P available to GCI in the Fairbanks and Juneau markets until January 1, 2008. This gives GCI over three years to complete its transition to cable telephony or otherwise continue to build out its telecommunications plant. It thus would be impossible for the Commission to make a finding of impairment in the Fairbanks or Juneau markets at this time. If GCI believes that it will be impaired without access to UNEs in these markets in 2008, GCI may seek an "impairment" finding from the Commission at the appropriate time.

II. THE COMMISSION SHOULD REJECT REQUESTS TO REQUIRE UNE-P IN THE ANCHORAGE MARKET; THE RECORD DEMONSTRATES GCI WOULD NOT BE IMPAIRED IN THE ABSENCE OF SWITCHING IN ANCHORAGE

In the Triennial Review implementation proceedings in Alaska, GCI argued that it was impaired in the absence of the switching UNE because there were some customers that it could not reach using ACS loops and its own switches collocated at ACS wire centers.[1] GCI failed to show that it could not "reach" these customers by deploying additional facilities at remote switching points; nor did GCI offer any evidence why it could not "reach" these customers via its own cable distribution plant. Rather, GCI attempted to place the burden on ACS to effectively bring the customer to GCI at the lowest possible cost – the UNE price – even though no legal "impairment" had been established. In response, ACS pointed out that the

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[1] *See* Comments of General Communication, Inc. at 13, 16 ("GCI Comments"); ACS' Reply Comments, filed in RCA Docket No. R-03-07, at 31 (Apr. 2, 2004) ("ACS RCA Reply") (attached to the Comments of ACS-AN to the FCC as Exhibit B).

threshold for "impairment" under the statute is not whether GCI has the easiest, least cost option for reaching the customer.[2] As the Supreme Court explained:

> the assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes failure to provide that element to "impair" the entrants ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms.[3]

The Court continued by stating that a CLEC is not impaired "in its *ability* to provide services -- even impaired in that ability 'in an ordinary, weak sense of impairment,' . . . -- when the business receives a handsome profit but is denied an even handsomer one."[4]

In this proceeding, GCI again attempts to distract attention from the statutory "impairment" standard. GCI seems to argue that it can force ACS to make investments to facilitate GCI's entry, but GCI need not make any expenditure to gain facilities-based access to ACS's customers. This time, GCI takes the argument a step further. Not only does the cable system operator demand access to unbundled switching (even though it has won over 45 percent of the market in Anchorage without ever buying unbundled switching from ACS), but GCI adds that it ought to have access to the UNE-P in order to ensure it has access to those nine percent of customers ACS serves that GCI claims it cannot reach today. GCI presents its argument not in terms of "impairment" as defined by the Act and interpreted by the courts, but merely in the vernacular: GCI complains of costs beyond what would be incurred if GCI had "direct" access

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[2] As ACS explained in its Comments, the legal requirement for impairment is somewhat more demanding than showing that the CLEC does not have the cheapest, most convenient form of access to customers. Indeed, the Supreme Court reads the Act to require CLECs to "stretch" in order to provide its services to areas to which it currently does not have facilities-based access. Comments of ACS of Anchorage, Inc. at 17 ("Comments of ACS") (quoting *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388-90 & n.11 (1999) ("*Iowa Utilities*")).

[3] *Iowa Utilities*, 525 U.S. at 389-390 [emphasis in original].

[4] *Id.* at n.11.

to those nine percent of customer loops at the central office. However, GCI fails to provide any evidence that these costs are sufficient to constitute "impairment" within its legal meaning. GCI provides no analysis of either the alternative of using its cable plant, or the alternative of deploying facilities at the remote terminal as suggested by ACS, but merely claims that costs "vary."[5] GCI's attempt to salvage UNE-P in a market that is fully and irrevocably competitive is unpersuasive.

As set forth in ACS's initial comments, GCI garnered nearly 45 percent market share *without ever ordering the switching or shared transport UNE*. In its Comments to the FCC, GCI confirmed its lack of impairment by stating that it could reach a full 91 percent of Anchorage loops from its switches collocated in the ACS central offices. ACS provided expert testimony by former FCC Chief Economist Dr. Howard Shelanski confirming that this fact alone is powerful evidence of non-impairment in the Anchorage market.[6] Add to this the evidence that GCI has begun moving Anchorage customers to its own cable plant, over which it has begun to roll out circuit-switched telephony, and Dr. Shelanski concluded that GCI has effective facilities-based access to all or virtually all homes and businesses in Anchorage.[7] Under any definition of impairment, GCI should be viewed as unimpaired.[8]

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5 GCI Comments at 22.

6 Affidavit of Howard A. Shelanski at ¶¶ 18-26 ("Shelanski Affidavit") (submitted with Comments of ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of Alaska, Inc., filed in RCA Docket No. R-03-07, at 2 (Jan. 12, 2004) ("ACS RCA Comments") (attached as Exhibit A to ACS-AN's Comments filed at the FCC in this proceeding)).

7 *Id.* ¶ 22-23

8 *Id.* ¶¶ 18-26.

GCI's claim that it now needs UNE-P in order to "build and maintain a customer base necessary for complete transition to its own network"[9] is humorous on several levels. Taken to its logical conclusion, GCI's reasoning would support continued unbundling, and access to UNE-P, even if GCI has won 91 percent of the market share, as long as there are any customers that GCI cannot reach without making some investment, however minimal. GCI seems to believe that it should continue to have access to UNEs until it has transferred the entire population of Anchorage to its cable telephony plant. As explained by Dr. Shelanski, GCI is ignoring both the legal standard of "impairment" and economic reality:

> The fact that GCI cannot today reach all customers, does not . . . mean that GCI is competitively impaired. Indeed, such an argument for impairment would imply that even if GCI took 90% of local exchange customers in Anchorage, it would still be able to claim it is competitively "impaired" and demand unbundled switching from the incumbent that has only the remaining 10% of the market. But such a claim of impairment would defy common sense and sound economic policy. The fact that GCI's existing switches allow GCI potentially to capture half or more of the customers in each of ACS' LEC service areas demonstrates that GCI is unimpaired not only in *competing* but, insofar as switching is concerned, is unimpaired in *dominating* the markets it has entered.[10]

ACS demonstrated to the RCA and in its Comments to this Commission, GCI *could* reach the very small percentage of Anchorage customers for which GCI claims impairment with minimal investment.[11] GCI could serve these customers in at least three ways: (i) by

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9 GCI Comments at 8.

10 Shelanski Affidavit at 11 [emphasis in original].

11 ACS Comments at 16-17 (citing Affidavit of Kenneth Sprain (submitted with the ACS RCA Reply); Shelanski Affidavit at ¶ 21 ("[T]he mere fact that GCI would have to purchase a remote switch and either build or buy transport does not of course mean that . . . new customers should be viewed as a separate market. Only if such costs are so high as to make it uneconomic or inefficient to use an existing host switch to serve those customers should the market be defined more narrowly. I have seen no evidence to suggest that GCI cannot

deploying facilities remotely, as ACS has invited GCI to do; (ii) by offering them service over GCI's own cable plant, which GCI has announced its plans to do; and (iii) by providing service via resale, as an entry strategy, pending the transition to a facilities-based solution. GCI has utterly failed to refute the adequacy of any of these methods, let alone all three. GCI states that collocation "is not a real solution" but fails to cite any Anchorage-specific evidence.[12] GCI's vague reference to "substantial expenditures" is not sufficient to show impairment.[13] GCI must demonstrate that market entry is economically infeasible, an impossibility for a carrier with an established – some say dominant – market position as GCI enjoys. General statements that there are customers not passed by GCI cable plant[14] are similarly vague. Especially when GCI's cable system passes 95 percent of Anchorage residences, GCI should be required to demonstrate why it cannot, with a reasonable financial commitment, reach all of the Anchorage market using a combination of its own facilities and resale.[15]

The purpose of unbundling is to facilitate local telecommunications market entry, and the definition of the "market" is not each individual customer.[16] Throughout its Comments,

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continue to add remote switching capability and transport that extends the reach of its existing switches to new customers . . . .")).

12 GCI Comments at 23 (citing to space limitations asserted by SBC).

13 *Id.* at 22.

14 *Id.* at 27.

15 ACS Comments at 8. The Act anticipates that new entrants would provide services using three entry modes: (1) their own facilities; (2) their own facilities in combination with the incumbent carrier's UNEs; and (3) total resale of the incumbent carrier's service. GCI's statement that there are only "two means by which it could conceivably serve its customers" ignores resale as an entry strategy. GCI cannot simply dismiss resale as an option because it would be less attractive for GCI than using UNE-P. GCI Comments at 23 (explaining that it seeks UNE-P instead of resale to obtain universal service support and access charge revenues that are not normally available with total service resale).

16 ACS Comments at 17 (citing Shelanski Affidavit at ¶ 21).

GCI is vague as to which market it is referring, and even what a "market" is.[17] As to switching, GCI claims that because it cannot serve nine percent of customers using its collocated switches, it needs access to switching as a UNE, or the UNE-Platform. (GCI never attempts to explain why it would need the shared transport UNE, as discussed below, but seems to assume that UNE-P and the switching UNE are fungible from a regulatory perspective. From an economic perspective, ACS assures the Commission, they are not.) There can be no question that GCI has entered the Anchorage market[18] and established a strong presence with nearly half the local and long-distance customers and 100 percent of the cable television customers.

Although not relevant to "impairment" under the statute, GCI also makes a policy argument that having access to UNE-P will somehow encourage GCI to move to facilities based competition.[19] This statement makes no sense. UNE-P is not true "facilities-based" competition, but rather a form of total resale that has widely been acknowledged as retarding the expansion of real facilities-based competition.[20] Ironically, as the ILEC's co-equal in the Anchorage market,

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[17] GCI is sufficiently vague as to be misleading in its characterization of the markets where this matters. ACS has four LECs in Alaska – ACS-AN, ACS, AK, ACS-F and ACS of the Northland, Inc. ("ACS-N"). ACS respectfully submits that the only Alaska market properly under consideration in this proceeding is the Anchorage market. As discussed further below, GCI has agreements with ACS-AK and ACS-F that provides GCI access to UNE-P through January 1, 2008. ACS-N is exempt from unbundling requirements pursuant to the Act's rural exemption. GCI's reference to Matanuska Telephone Authority ("MTA") also is curious, as GCI has not entered that market. By aggregating data and making vague statements related to impairment, GCI takes the focus off of its relatively dominant position in the Anchorage market.

[18] ACS RCA Comments at 9-11 (discussing that the proper market definition is the service area served by the incumbent LEC).

[19] *See* GCI Comments at 8.

[20] *See, e.g., Powell Blames CLEC Money Woes on Lenders, Bad Business Plans,* COMMUNICATIONS DAILY (May 23, 2001) ("I think government policy was a little too generous in incenting quick models. I think resale is valuable, UNE-P is valuable. But at the end of the day it's my personal belief that resale and UNE-P are good entry strategies to a

GCI makes a particularly unsympathetic proponent of UNE-P. The FCC should reject attempts by any well-established market player to proliferate the use of UNE-P.

The silliness of GCI's claims about UNE-P being a necessary entry strategy is exceeded only by the absurdity of GCI's argument that it is being "denied the ability to serve the customer on a facilities-basis."[21] Nowhere is it written that GCI cannot invest in its own facilities and turn up its cable telephony service. Nowhere does GCI explain how granting the relief GCI requests will give it an incentive, rather than a disincentive, to hasten the offering of that true facilities-based alternative. The Commission should not create a scenario in which "UNEs will be available to CLECs in . . . markets where there is no reasonable basis for thinking that competition is suffering from any impairments of a sort that might have [been] the object of

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point, but you've got to have a plan to go to something longer and more viable. . . . I don't disagree with UNE-P as a vehicle, but you know it wasn't in the statute like that. It was sort of a creative combination of the Commission"); *Keeping Telecom Competition on Track*, Address by Kathleen Q. Abernathy, Commissioner, Federal Communications Commission before the Competition Policy Institute Forum (Dec. 7, 2001) ("The Commission is now engaged in an effort to restore the incentives for facilities-based investment that Congress intended. . . . This means a shift away from policies that actively encourage resale as a long-term business strategy and force the unbundling of virtually every network element at TELRIC rates. As the Supreme Court recognized in the Iowa Utilities Board decision, too much sharing destroys the investment incentives of both incumbents and CLECs . . . And CLECs will have little incentive to deploy their own networks when they can get access to incumbents' facilities at cost-based rates); *Framework for Broadband Deployment*, Remarks of Kevin J. Martin, Commissioner, Federal Communications Commission at the National Summit on Broadband Deployment (October 26, 2001) ("the Commission adopted a framework that may have discouraged facilities-based competition, allowing competitors to use every piece of the incumbents' network at super-efficient prices. This regime creates significant disincentives for the deployment of new facilities that could be used to provide broadband. Under such a regime, new entrants have little incentive to build their own facilities, since they can use the incumbents' cheaper and more quickly. And incumbents have some disincentive to build new facilities, since they must share them with all their competitors").

[21] GCI Comments at 13

Congress's concern."[22] Even assuming that GCI's expected expenditures could be described as "substantial," GCI is *not* "impaired" in Anchorage by an inability to reach *nine percent of customers* via its own facilities. To the contrary, the ability of GCI to reach over 90 percent of customers is an affirmation of non-impairment.

As an aside, ACS takes exception to GCI's implication that the presence in ACS's network of certain terminals that do not support multihosting constitutes a "practice of blocking access to GCI customers through network architecture decisions."[23] The terminals that lack multi-hosting functionality were installed prior to the commencement of competition, before ACS was required to provision UNEs to GCI – ACS has made no "network architecture decisions" that involved recent installation of such facilities, nor does GCI offer any evidence to support its insinuations.[24] In fact, ACS was one of the first, *if not the first*, incumbent carriers in the United States to aggressively deploy remote terminals that allow for multi-hosting functionality, allowing GCI to reach 91 percent of Anchorage loops using its own switching facilities.

In any event, it is not clear what GCI thinks it has proven with these slights, and regardless of the intentions of ACS, the result remains that, with 45 percent of the market and facilities-based access to virtually every customer, GCI is not impaired in Anchorage as a result of ACS's network architecture. In sum, there is no evidence on the record to support a finding

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[22] *United States Telecom Assoc. v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2000).

[23] GCI Comments at 8. Similarly, GCI claims, without any support, that "many ILECs have designed their networks and deployed equipment to make impossible for a CLEC to gain access to traffic from the loops serving its customers at the central office." *Id.* at 9. There is no evidence whatsoever that ACS had any such intention.

[24] Of course, GCI does not make its network architecture decisions with a mind toward allowing its competitors access to its telephony plant.

that GCI would be impaired in the absence of the switching UNE, and no justification for extending UNE-P to a carrier that is fully established as a competitor in Anchorage.

III. GCI IS NOT IMPAIRED WITHOUT ACCESS TO DEDICATED TRANSPORT, ENTERPRISE LOOPS OR MASS MARKET LOOPS

GCI makes the erroneous claim in its Comments to the FCC that it is "impaired" without access to unbundled dedicated transport and loops.[25] GCI makes no attempt to show that *GCI* would actually be impaired without mandatory access, but rather bases its analysis on tests set forth in the Triennial Review that have since been discredited by the DC Circuit.[26] Based on the facts that ACS presented to the FCC and the RCA, GCI clearly is not impaired without access to dedicated transport, enterprise loops or mass-market loops and should be required to provide substantial evidence of impairment in order to be granted mandatory access to the dedicated transport and loop UNEs.

A. The Record Demonstrates No Impairment in the Absence of Dedicated Transport UNEs

GCI's claim that "no party disputed the FCC's [impairment] findings" at the RCA regarding dedicated transport[27] is just not true. Even in the same document, GCI attempts to back-peddle by conceding in a footnote that "no party *originally* challenged the national impairment finding," but this, too, is a misstatement.[28] Although ACS orally represented that the strongest evidence of non-impairment related to the switching and shared transport UNEs, ACS also indicated orally and then in its RCA Comments that "[t]he available evidence . . . strongly

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25 GCI Comments at 27-31.

26 *Id.*

27 *Id.* at 5.

28 *Id.* n.11.

suggests that transport facilities are not a source of competitive impairment in Alaska."[29] ACS requested discovery on dedicated transport, *which the RCA granted*, and which ACS analyzed in its RCA Reply Comments.[30] With the benefit of discovery, ACS was able to confirm non-impairment as to the DS-3 and dark fiber dedicated transport UNEs and provided expert testimony in support of this conclusion.[31] The RCA proceeding was suspended before the RCA could rule on this matter.

In its comments to the FCC, GCI does not even attempt to show that it is impaired without access to dedicated transport. Instead, GCI relies on the FCC's route-by-route, multiple carrier impairment test that was vacated by the DC Circuit. As stated, precedent demonstrates that the presumption is against a finding of impairment.[32] GCI concedes that it "*does* have fiber facilities between ACS central office locations and makes high-capacity fiber available under tariff."[33] ACS also placed evidence on the record that a third fiber provider, Alaska Fiberstar ("AFS"), collocated in each of ACS's wire centers. While GCI dismisses AFS as another competing provider based on the record at the RCA, the RCA record is incomplete due to the fact that the RCA proceeding was stayed.

As ACS stated in its Comments, GCI already provides all of its own transport between ACS wire centers, and *has never order the dedicated transport UNE in the Anchorage market*.[34] Considering that GCI has garnered nearly half of the Anchorage local exchange market having never ordered the dedicated transport UNE from ACS-AN, there is no basis on

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[29] ACS RCA Comments at 25.

[30] ACS RCA Reply Comments at 30-33.

[31] *Id.*

[32] *Iowa Utilities*, 525 U.S. at 391-392

[33] GCI Comments at 28 [emphasis added].

[34] ACS Comments at 10.

which the Commission could reasonably find GCI to be impairment without mandatory access to dedicated transport in Anchorage.[35]

B. GCI Cannot Justify Unbundling of Loops in Anchorage

Although ACS sought only relief with regard to DS-3 and dark fiber loops, it seeks relief with regard to all enterprise and mass market loops here.[36] ACS proposes that the Commission should presume no impairment with regard to enterprise and mass market loops in the ILEC's local exchange serving area where a CLEC:

> **(1)** has 30 percent or more of the local exchange market served by the ILEC;
>
> **(2)** has deployed distribution facilities that pass 60 percent or more of the customers in the market (regardless of technology); and
>
> **(3)** is actually providing local exchange services over some portion of its own facilities in that market.[37]

ACS has shown that GCI far exceeds each of these criteria in the Anchorage market.[38]

Rather than provide facts that attempt to show that GCI would be impaired without access to loops, as with dedicated transport, GCI relies on the multiple-carrier impairment analysis set forth in the Triennial Review Order, which the DC Circuit vacated.[39] Based on the evidence provided herein and ACS's initial Comments, there is no credible argument that GCI is impaired in Anchorage without access to unbundled loops. GCI cannot show impairment even as to the nine percent of customers that it claims that it cannot currently

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[35] *Id.* at 10-11.

[36] *Id.* at 11-15.

[37] *Id.* at 14.

[38] GCI Comments at 30.

[39] *See, e.g., United States Telecom Assoc. v. FCC*, 359 F.3d 554, 574 (D.C. Cir. 2004).

reach when it meets the above-stated three-prong test. GCI is not a "new entrant," but already is a facilities-based carrier that has successfully entered the Anchorage market.

IV. A BATCH HOT CUT PROCESS IS NOT NEEDED IN ANCHORAGE

There is no evidence that a batch hot-cut process should be mandated in the Anchorage market. GCI's evidence of the need for a hot-cut process is based on allegations of processing and provisioning delays that arose over two years ago, and which since have been resolved by agreement between GCI and each of ACS-AN, ACS-AK and ACS-F.[40] GCI is particularly vague in its claims for need of a hot-cut process in Anchorage, citing purported *delays from 7 years ago* "when GCI rolled out service in Anchorage,"[41] Reflecting this lack of current support for its claims, GCI speaks more generally in its Comments about how "CLECs are impaired" without a batch hot-cut process. To demonstrate impairment without a hot-cut process, GCI should be required to provide current GCI-specific data of impairment. GCI could not carry such a burden.

The FCC intended the batch hot cut analysis to mitigate switching impairment that may arise from large volumes of transfers of a competitor's mass market customers from the switching UNE to its own switches.[42] It is ACS's understanding that batch-cut processes

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[40] On March 5, 2004, the parties settled an ongoing dispute relating to all provisioning and ordering issues for UNEs in services in Anchorage, Fairbanks and Juneau. *See In The Matter Of The Petition By GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI For Arbitration Under Section 252 Of The Telecommunications Act Of 1996 with the Municipality of* Anchorage d/b/a Anchorage Telephone Utility a/k/a ATU Telecommunications For The Purpose Of Instituting Local Exchange Competition, Order Setting Prices For Access To Unbundled Network Elements, Resale And Terms And Conditions Of Interconnection, U-96-89, Order No. 42, at 68 (RCA June 25, 2004) (available at http://www.state.ak.us/rca/orders/2004/u96089_42.pdf).

[41] GCI Comments at 33.

[42] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications*

anticipate the required capabilities of the Bell Operating Company, which fulfill thousands of hot-cuts each day. In contrast, ACS simply does not experience the volumes of batch hot cuts that the FCC envisioned. Across the entirety of the ACS-AN, ACS-AK and ACS-F markets, hot cuts averaged only 148 per day in aggregate in 2002, and 130 per day in 2003.[43] ACS currently is capable of processing 314 orders per-day for all ACS markets, comfortably above the average hot-cut order volume. As such, ACS already has a procedure in place for hot-cuts that meets GCI's actual demand.

Furthermore, in all of its markets -- but in Anchorage especially where GCI already has 45 percent market share -- ACS does not anticipate any "mass" hot-cut orders or increase order volume. In GCI's own words, hot-cuts are intended for "mass UNE-P to UNE-L conversions."[44] Considering that GCI has never ordered UNE-P in Anchorage, it is hard to explain how GCI could be impaired without a mandated batch hot-cut process. The evidence simply does not support such a finding.

ACS also takes issue with GCI's references to "processing delays." ACS currently offers processing within 48 hours of all orders that GCI submits manually to ACS for ACS to process, and has offered GCI an electronic ordering alternative that would allow for processing instantaneously upon GCI's entering the order. GCI has thus far refused to participate in ACS's electronic operations support system ("EOSS"), thus foreclosing the possibility of instantaneous processing. GCI continues to submit its order to ACS customer service representatives, who then must process GCI's orders. Continued lack of an electronic

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Act of 1996; Deployment of Wireline Services Offering Advance Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at ¶¶ 423, 460 (2003) ("Triennial Review Order").

43 ACS RCA Comments at 24.

44 GCI Comments at 33.

ordering process, and the minor processing delays that accompany manual ordering, could be eliminated if GCI would adopt EOSS.

V. AN IMPAIRMENT FINDING WITH REGARD TO FAIRBANKS AND JUNEAU WOULD BE INAPPROPRIATE AT THIS TIME

ACS placed substantial evidence on the record in the RCA proceeding that demonstrates GCI's lack of impairment in the ACS-AN and ACS-F markets.[45] However, since submitting these comments to the RCA, ACS-AN and ACS-F each have entered into substantially similar interconnection agreements with GCI which guarantee GCI access to UNE-P until January 1, 2008.

Pursuant to these agreements, GCI has more than three years to complete its transition to cable telephony or otherwise continue to build out its telecommunications plant. It thus would be impossible for the Commission to make a finding of impairment in the Fairbanks or Juneau markets at this time. Mandating UNE-access in Fairbanks and Juneau at this time would be contrary to the requirements of the Act, and would discourage GCI's progress toward becoming a fully facilities-based competitor. If GCI believes that it will be impaired without access to UNEs in these markets in 2008, GCI may, at the appropriate time, seek an "impairment" finding from the Commission. It would be a waste of Commission resources to attempt to make an impairment finding in Fairbanks and Juneau, when such an exercise would be wholly speculative and have no relevance for more than three years.

VI. CONCLUSION

"GCI prefers to maximize its investment and use its deployed facilities to serve customers without having to rely on the facilities of the ILEC."[46] This proceeding gives the FCC

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[45] *See generally* ACS RCA Comments; ACS RCA Reply Comments.

[46] GCI Comments at 8.

the opportunity to grant GCI's wish. The Act requires a finding that GCI would be impaired, or unbundling may not be mandated. ACS has presented substantial evidence that GCI would not be impaired without mandatory, regulated access to UNEs in the Anchorage market. GCI has fallen woefully short of rebutting this evidence. The Commission must not treat GCI, an entrenched competitor, like a new entrant. Doing so only has served to retard GCI's promised transition to its own telecommunications plant.

If the Commission wishes to induce carriers to provide true facilities-based competition, it should reject proposals to continue UNE-P or *any* UNE in perpetuity. The test must not require an ILEC to provide UNE access until the CLEC has deployed facilities to serve every single customer in a market. In other words, the Commission must not wait until the CLEC is the dominant carrier before the CLEC is deemed unimpaired. Such a reading of the statute could not withstand judicial review.

Based on the foregoing, ACS urges the Commission to grant ACS relief as to GCI for the following UNEs in the Anchorage market: (1) mass market switching; (2) shared transport; (3) dedicated transport; (4) enterprise loops; and (5) mass market loops. ACS also reiterates that the Fairbanks and Juneau markets are not at issue at this time. It would be wholly speculative and a waste of resources for the Commission to attempt to perform an impairment analysis for markets in which ACS has agreed to provide UNE access until 2008.

Respectfully submitted,

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